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December 20, 2002

EX PARTE – Via Electronic Filing

Ms. Marlene Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Re: CC Docket Nos. 01-338, 96-98, and 98-147

Dear Ms. Dortch:

Attached for inclusion in the record of this proceeding is a letter to Chairman Powell and the commissioners from Robert A. Curtis, President of Z-Tel Network Services, and Thomas M. Koutsky, Vice President, Law and Public Policy, concerning the role of the state commissions in determining which network elements should be unbundled and the rates that may be charged to lease those network elements.

Sincerely,

/s/

Christopher J. Wright
Counsel Z-Tel Communications, Inc.

cc: Chris Libertelli
Matt Brill
Jordan Goldstein
Dan Gonzalez
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December 20, 2002

Ex Parte

Honorable Michael K. Powell
Chairman
Honorable Kathleen Q. Abernathy
Honorable Michael J. Copps
Honorable Kevin J. Martin
Honorable Jonathan S. Adelstein
Commissioners
Federal Communications Commission
445 12th Street, S.W., Room 8-B201
Washington, DC 20554

Re: The role of the state commissions in determining which network elements should be unbundled and the rates that may be charged to lease those network elements, CC Docket Nos. 01-338, 96-98, and 98-147

Dear Chairman Powell and Commissioners:

The role of the state commissions in opening local telecommunications markets to competition continues to be a central issue in the *Triennial Review* proceeding. The Bell Operating Companies recently asked the Commission to preempt the states from making unbundling decisions, even though the market-opening provisions of the 1996 Telecommunications Act divide authority between state and federal authorities.[1] The BOCs also claimed that the states have no role to play in determining what constitutes an appropriate rate for the network elements the BOCs must make available under section 271, even though state commissions are directed to establish rates for network elements.[2]

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[1] Letter of November 19, 2002, to Chairman Powell from Herschel L. Abbott, Jr., BellSouth, R. Steven Davis, Qwest, Paul Mancini, SBC, and Susanne Guyer, Verizon (*BOC Preemption Letter*).

[2] We nevertheless welcome the BOCs' acknowledgement that section 271 "impose[s] an independent obligation on the BOC to provide the element in question." Letter of November 21, 2002, to Marlene H. Dortch from Cronan O'Connell, attachment at 1 (*Qwest 271 Letter*).

The BOCs are wrong as a matter of law and policy. Under the 1996 Telecommunications Act, the state commissions have a clear and important statutory role in determining what network elements are subject to unbundling and the price at which they must be offered. Only by ignoring the relevant statutory provisions – as the BOCs do in their letter – is it possible to contend to the contrary. As explained below, section 252 clearly authorizes state commissions to arbitrate disputes concerning the price and availability of network elements; section 251(d)(3) expressly preserves the State commissions' ability to add unbundling obligations to those established by the Commission; and section 271 requires the BOCs to provide unbundled access to the network elements that comprise the platform at cost-based rates.

Summary. In 1996, Congress adopted a new model of federal/state cooperation to govern the resolution of disputes between carriers concerning network elements. Under section 252, if an incumbent local exchange carrier and a new entrant cannot agree on the network elements to be leased or the rates for those elements, a state commission is explicitly authorized to arbitrate the dispute.

With respect to rates for network elements, the Commission has authority to promulgate methodological rules interpreting the statutory cost-based pricing provision of section 252(d)(1), and it exercised that authority by adopting the TELRIC rules. The Commission may not ignore that statutory provision, which states that network elements must be leased at a rate "based on the cost ... of providing the ... element." Under the procedures Congress adopted, the state commissions actually establish rates for leasing network elements.

With respect to the specific network elements to be provided, in section 271 Congress determined that the BOCs must provide unbundled access to loops, transport, switching, and signaling. Congress also authorized the Commission to promulgate rules governing whether new entrants should be permitted to lease other network elements or any elements provided by ILECs other the BOCs. But as with pricing, the state commissions are the entities that determine which network elements must be provided to particular requesting carriers under the federal standards in the course of arbitrating interconnection agreements. Further recognizing the state role in opening local markets to competition, Congress specifically preserved state authority to establish additional unbundling obligations pursuant to state law in section 251(d)(3).

In their letter, the BOCs ignore most of these statutory provisions, and the letter shows that they completely fail to comprehend that the state commissions have an important role to play in implementing the market-opening provisions of the 1996 Act. A comparison of their letter and their position in 1996 suggests that the BOCs are incapable of being moderate: the 1996 Act neither gives virtually all authority to the states (as the BOCs contended in 1996), nor does it give virtually no authority to the states (as they now argue). Instead, Congress divided authority between this Commission and the states. With respect to the issues of importance in this proceeding, Congress gave this Commission rulemaking authority to interpret the impairment standard of section 251(d)(2) and create a methodology governing the cost-based rate provision, while generally leaving application of those standards to the state commissions.

As Z-Tel has argued in detail in its prior submissions in this docket, the core guidance this Commission should provide is that a requesting carrier is impaired without access to a

network element if the carrier's output would decline in a significant and non-transitory manner without access to the element. Z-Tel also has shown that all ILECs should be required to provide unbundled access to the platform of network elements to competitors seeking to serve the mass market on account of the impairment caused by the manual hot cut bottleneck and other economic and operational barriers. That determination may be made at the national level because, at this time, all competitors seeking to serve the mass market are impaired. This Commission's work is largely completed with respect to pricing – the only remaining task should be to recognize that the Commission erred in 1999 by concluding that the statutory pricing rule governing network elements does not apply to network elements provided by the BOCs pursuant to section 271.

Given the Commission's tentative conclusion in the notice of proposed rulemaking that a more granular approach is warranted with respect to many issues – a conclusion now compelled by recent D.C. Circuit decisions – a narrow focus will be required to resolve many remaining disputes. As a practical matter, it will be necessary for state commissions, rather than this Commission, to make those detailed determinations. Accordingly, the Commission may not and should not do what the BOCs now ask it to do and preempt states from making unbundling decisions. Nor should the Commission direct the state commissions to ignore the cost-based pricing rule established by Congress to govern network elements.

1. *Section 252 authorizes the state commissions to determine what network elements should be unbundled and to establish rates for network elements.* Section 252 directs the state commissions to arbitrate disputes between incumbent LECs and new entrants when they cannot agree on the terms of an interconnection agreement. That provision makes clear that (a) which network elements are to be made available and (b) the price for those elements are the core of an interconnection agreement. In fact, the only specific guidance the Act provides concerning the substance of interconnection agreements is set forth in section 252(a)(1), which states that "[t]he agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement."

Therefore, contrary to the assertions made by the BOCs, there is no issue of "delegation" here.[3] Congress specifically authorized the state commissions to arbitrate interconnection agreements, and interconnection agreements must include a list of network elements to be provided and the price for those elements. Of course, section 252(c) directs the state commissions to follow the terms of the statute and the Commission's implementing regulations when arbitrating interconnection agreements. But consider a state commission's role if there were no FCC unbundling regulations: the state commission would still arbitrate interconnection agreements, and do so in conformity with the terms of the statute and the regulations in effect, such as the pricing regulations.[4] With respect to what network elements should be made available, the state commission would make its determination based on its interpretation of the

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[3] *See BOC Preemption Letter* at 4.

[4] There were no federal pricing regulations in effect from the time the Eighth Circuit stayed the Commission's pricing rules in 1996 until the Supreme Court reversed that decision in 1999. During that period, of course, interconnection agreements were negotiated, arbitrated, and approved by state commissions.

requirements of sections 251 and 271, together with any relevant state statute. The absence of federal unbundling regulations would make the state commission's job somewhat more difficult, but it would not relieve the BOCs of their obligation to provide unbundled access to network elements. Nor would the absence of federal unbundling regulations prevent the state commissions from determining what network elements the BOCs must provide to requesting carriers or the price for those elements.

The BOCs argue that section 251(d)(2) "directs the Commission – not 50 different state commissions – to 'determin[e] what network elements should be made available.'"[5] Although the BOCs criticize AT&T for "its expedient about-face,"[6] in making that argument the BOCs contradict their own prior positions: in 1996 BellSouth argued that the statute should be interpreted "as requiring the Commission to identify network elements only when a state commission has failed to carry out its responsibilities under section 252" and the other BOCs advanced similar positions.[7] The Commission declined to adopt the BOCs' 1996 position, but also declined to adopt the extreme opposite position – now advocated by the BOCs – "of developing an exhaustive list of required unbundled elements to which states could not add additional elements."[8] The Commission considered – and reasonably rejected – the strained reading of the introductory clause of section 251(d)(2) now advanced by the BOCs under which the Commission, and only the Commission, may identify network elements to be unbundled. Instead, the Commission identified "a minimum list of network elements," provided general guidance concerning the meaning of "impairment," and concluded "that the states may impose additional unbundling requirements."[9]

The Commission's 1996 interpretation of the introductory clause of section 251(d)(2) – which was never even challenged in court, despite the litigious tendencies of the BOCs – is plainly the proper interpretation of that phrase. The BOCs' argument – never set out clearly in their recent letter seeking preemption – appears to be that, by authorizing the Commission to "determin[e]" what network elements should be made available, Congress required the Commission to issue an "exhaustive list." That is not a plausible construction of the introductory clause of section 251(d)(2), read in context. Rather, given the complexity of the issues and the statutory roles given to state commissions – both the procedural role of arbitrating interconnection disputes and the substantive right to establish additional unbundling requirements – it is clear that Congress did not order the Commission to issue an exhaustive list

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[5] *Id.* at 2.

[6] *Id.*

[7] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 229. Like BellSouth, U S West opposed "the Commission's identification of a minimum list of required unbundled network elements." *Id.* at ¶ 235. SBC, Bell Atlantic, and USTA similarly contended that "future unbundling requirements should be determined by parties through voluntary negotiations" rather than by a list identified by the Commission. *Id.* at ¶ 239.

[8] *Id.* at ¶ 243.

[9] *Id.* at ¶¶ 241, 244.

of network elements. Congress instead directed the Commission to issue rules governing the circumstances under which requesting carriers are impaired without access to network elements – rules that may include a list of network elements that must be unbundled. It takes a highly strained reading of section 251(d), however, to conclude that only the Commission has authority to determine what network elements must be unbundled. The language of the Act does not so provide, and such a conclusion simply would not make sense in the context of a statute that directs the state commissions to arbitrate interconnection disputes and preserves their authority to add unbundling obligations.[10]

In short, contrary to the BOCs' "expedient about-face" on the role of the states, Congress authorized the state commissions as well as the FCC to play an important role in determining what network elements should be unbundled and the price at which they are to be provided. While the Commission has authority to identify network elements that must be unbundled by all ILECs, it reasonably concluded in 1996 that it should not attempt to identify an "exhaustive list" of network elements. As discussed below, that conclusion is essentially mandated, as a practical matter, by the *USTA* and *CompTel* decisions. It also is mandated, as a legal matter, by section 251(d)(3), as interpreted by the Eighth Circuit in a decision that binds the Commission.

2. *The* USTA *and* CompTel *decisions require the Commission to rely on the superior fact-finding capabilities of the state commissions.* The D.C. Circuit held in *USTA* that section 251(d)(2) requires granular unbundling rules.[11] In overturning the Commission's decision generally to adopt rules of "unvarying scope," the D.C. Circuit criticized the Commission for "loftily abstract[ing] away all specific markets" and held that the statute does not permit determinations as to whether carriers are impaired without particular network elements to be made "detached from any specific markets or market categories."[12] Thus, *USTA* plainly requires unbundling decisions to distinguish between different geographic and product markets. In *CompTel*, the D.C. Circuit focused on the language of section 251(d)(2) and held that "[b]y referring to the 'services that [the requesting carrier] seeks to offer,' it seems to invite an inquiry that is specific to particular carriers and services."[13] The court reiterated that in *USTA* it had "clearly found in the FCC an authority to make distinctions that were based on regional differences or on customer markets."[14] It went on to say that "[i]f these are permissible, it is hard to understand why the Act would not allow restrictions keyed to a specific 'service' of the

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[10] In fact, the text of sections 251 and 252 imply a limited FCC role in this area while state commissions have a significant and continuing role. In particular, section 251(d)(1) requires the FCC to "complete all actions necessary to establish regulations to implement the requirements of this section" within six months, or August 6, 1996. In contrast, the state authority preserved under section 251(d)(3) is not so time-limited, nor is state commission authority to arbitrate the rates, terms and conditions of interconnection agreements.

[11] *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (*USTA*).

[12] *USTA*, 290 F.3d at 421, 423, 426.

[13] *Competitive Telecommunications Association v. FCC*, 2002 U.S. App. LEXIS 22407 (D.C. Cir. 2002) (*CompTel*) at *9.

[14] *Id., citing USTA*, 290 F.3d at 422-23.

requesting carriers."[15] Those decisions correctly require a granular analysis wherever impairment varies depending on the specific service a particular carrier seeks to offer or the particular geographic or end-user market the carrier seeks to serve.

Under *USTA* and *CompTel*, an impairment determination must be made for each network element with respect to (a) particular requesting carriers, (b) for each of the services they seek to offer, (c) in specific geographic markets, and (d) to serve particular types of end-users, whenever impairment varies depending on those factors. For example, it may be necessary to determine whether Z-Tel is impaired without unbundled switching to provide voice service in Sunbury, Ohio, to residential customers, or whether MCI is impaired without access to loops to provide broadband service in Los Angeles to medium-size businesses. More generally, the question will be whether, with respect to network element X (from NIDs to OSS), carrier A (from AT&T to Z-Tel), seeking to provide service B (from POTS to broadband) is impaired in geographic market C (from Alaska to Manhattan) to serve different types of end-users (from mass-market consumers to large, data-intensive businesses). Congress has taken loops, transport, switching, and signaling "off the table" with respect to the BOCs – they must provide unbundled access to those network elements in order to provide long-distance service – but, even so, the granular inquiry required by *USTA* and *CompTel* is plainly beyond the capabilities of an agency with limited resources based in Washington, D.C. [16] Congress wisely built in an on-going role for state commissions in arbitrating the rates, terms, and conditions of interconnection agreements.

Although it would be beyond the Commission's capabilities to attempt to promulgate an "exhaustive list" of granular unbundling obligations as competition develops, as discussed above, the Commission previously declined to provide an exhaustive list of network elements. There is certainly no reason to attempt to do so after *USTA* and *CompTel*. Rather, the Commission should provide a list of network elements without which most requesting carriers will be impaired to provide most types of services to most types of end-users in most geographic areas, and ask the state commissions to consider arguments by ILECs that particular requesting carriers are not impaired without access to those elements in particular geographic areas to provide particular services to particular categories of end-users.[17] Only the state commissions, which are (a) intimately familiar with conditions in their states, (b) are already in the business of

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[15] *CompTel* 2002 U.S. App. LEXIS at *9-*10.

[16] For example, earlier this year, the Texas commission examined – in the context of an interconnection agreement arbitration – whether unbundled local switching should continue to be made available by SBC statewide. The record in that proceeding consisted of over 12,000 pages, which take up several boxes. Revised Arbitration Award, Texas PUC Docket No. 24542 (*Texas Arbitration Award*). Z-Tel questions whether the FCC is prepared to review that record *de novo* and generate similar records on this issue in all other states. If the FCC is not so prepared, Z-Tel submits that it has no choice but to build a state fact-finding role into the UNE identification process.

[17] With regard to switching and transport, Z-Tel has previously provided in this docket a detailed discussion of how this process should be conducted. "A Five-Step Plan for Building Wholesale Switching and Transport Alternatives," attached to letter from Christopher J. Wright to Marlene Dortch (Nov. 22, 2002).

arbitrating interconnection disputes, and (c) regularly use fact-finding tools common in adjudicative proceedings, could possibly conduct those sorts of analyses.

A number of state commissions have advanced similar proposals concerning how the Commission should take advantage of their superior knowledge of local conditions and fact-finding capabilities. The Michigan commission proposed that the FCC should continue to maintain a national list of network elements that must be unbundled, but should also "establish a process by which state regulatory commissions can take the lead in determining when alternatives in their states are sufficiently available to warrant the 'de-listing' of a UNE."[18] Other state commissions made similar proposals,[19] as have many competitive local exchange carriers.[20] Contrary to the BOCs' claims, nothing in the Act forecloses the adoption of such procedures, and the D.C. Circuit's decisions virtually require that the Commission rely more heavily on the states.

3. *Section 251(d)(3) preserves state authority to establish additional unbundling obligations.* As its title ("preservation of state access regulations") states, section 251(d)(3) preserves the right of states to establish additional unbundling obligations. The BOCs stand section 251(d)(3) on its head and read it principally as a preemption provision. But it is not. It states that "the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that ... establishes access and interconnection obligations of local exchange carriers." Unlike various other provisions in the Act that require states to adopt rules that comply with FCC regulations,[21] section 251(d)(3) does *not* require state unbundling rules to be consistent with the federal unbundling regulations. To the contrary, that provision generally authorizes states to establish additional unbundling obligations that need not conform to federal regulations.[22] That conclusion is reinforced by section 252(e)(3), which provides that nothing in section 252 "prohibit[s] a state commission from establishing or enforcing other requirements of State law in its review of an agreement."

The state laws preserved by section 251(d)(3) include section 13-801(d)(4) of the Illinois Public Utilities Act. That Act, enacted in 2001, states that "A telecommunications carrier may use a network elements platform consisting solely of combined network elements of the

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[18] Michigan PUC Comments at 5.

[19] *See* Florida PSC Reply Comments at 2; Alaska RCA Reply Comments at 3-4; Colorado Comments at 5-6; Georgia PSC Comments at 4; Massachusetts DTE Comments at 5.

[20] *See* AT&T Comments at 246-50.

[21] *See, e.g.*, sections 252(c)(1) and 261(c).

[22] Section 251(d)(3) preserves any state unbundling rule that is "consistent with the requirements of this section" [section 251] and "does not substantially prevent implementation of the requirements of this section [section 251] or the purposes of this part [section 251 *et seq.*, "Development of Competitive Markets"]. Thus, for example, a discriminatory unbundling rule would be subject to preemption under that provision, since section 251(c)(3) requires nondiscriminatory access to network elements and would skew the development of competitive markets.

incumbent local exchange carrier to provide end to end telecommunications service."[23] Similarly, other states, such as Texas, have authority under state law to adopt additional unbundling requirements.[24] Also preserved are state unbundling rules adopted pursuant to state alternative regulation proceedings, as in New York, where Verizon was granted pricing flexibility as part of a proceeding in which it agreed to make the platform of network elements available.[25]

In applying section 251(d)(3), the Commission is bound by the Eighth Circuit's holding that section 251(d)(3) bars the Commission from "preemptively preempting" state unbundling obligations.[26] In the *First Report and Order*, in a passage that reads exactly like the argument in the BOCs' letter seeking preemption, the Commission concluded that "state requirements must be consistent with the FCC's implementing regulations" or they are preempted.[27] The Eighth Circuit reversed. It concluded that "the FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical" and held that "the FCC's belief that merely an inconsistency between a state rule and a Commission regulation" permits preemption "is an unreasonable interpretation of the statute."[28] That holding is binding on the Commission because, as the Commission told the Supreme Court, "*No* party has challenged that aspect of the Eighth Circuit's holding."[29] If the Commission nevertheless were to attempt to preemptively preempt, as the BOCs propose, it likely would be subject to an order from that court enforcing its mandate.

While ignoring the Eighth Circuit's holding, the BOCs complain that the states and NARUC, which have generally argued that section 251(d)(3) permits them to add unbundling obligations but have not argued that it authorizes them to delete unbundling obligations, "are pressing for a one-way ratchet" that is "asymmetrical."[30] But that is what the Act requires. The text of section 251(d)(3) preserves state rules that establish "obligations of local exchange carriers" and it does not grant rights to ILECs or authorize the state commissions to relieve ILECs of any obligations. The Supreme Court recently noted that the title of section 251(c) is

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[23] 220 ILCS 13-801(d)(4). The Illinois Commerce Commission concluded that "Ameritech's view that its unbundling obligations under section 13-801 are limited in each case to its federal obligations appear to be wishful thinking given the legislature's clear direction that we are to view the new obligations as additional."Illinois Commerce Commission, Order Implementing Section 13-801 of the Public Utilities Act, Docket No. 01-0614 (June 11, 2002).

[24] *See Texas Arbitration Award, supra.*

[25] Order Instituting Verizon Incentive Plan, NYPSC Case 00-C-1945 (Feb. 27, 2002).

[26] *Iowa Utilities Board v. FCC*, 120 F.3d 753, 806-07 (8th Cir. 1997), *not reviewed by AT&T v. Iowa Utilities Board*, 119 S. Ct. 721 (1999).

[27] *First Report and Order* ¶¶ 103.

[28] *Iowa Utilities Board*, 120 F.3d at 806, 807.

[29] FCC Reply Br. 19 n.13 *AT&T v. Iowa Utilities Board*, No. 97-826 *et al.* (filed June 1998) (emphasis added) (*FCC Supreme Court Brief*).

[30] *BOC Preemption Letter* at 3.

"Additional obligations of incumbent local exchange carriers" and concluded that the Act "proceeds on the understanding that incumbent monopolists and contending competitors are unequal."[31] In short, the Act is not symmetrical and section 251(d)(3) authorizes the states to add, but not subtract, unbundling obligations. The BOC arguments about asymmetry are a frontal assault on the structure of 1996 Act that has already been rejected by the Supreme Court.

Thus, state statutes establishing additional unbundling obligations are plainly permissible under the statutory scheme Congress adopted. If the BOCs believe that a particular state unbundling requirement is subject to preemption under the standards set forth in section 251(d)(3), they may file a preemption petition. But as we have pointed out,[32] the resolution of any such petition will show that there is no merit to the BOCs' arguments. The BOCs apparently would argue, for example, that preemption of state rules making the platform of network elements available is warranted because that will undermine the supposed congressional goal of promoting only full facilities-based competition. But there is no provision of the statute enshrining the goal of full facilities-based competition – to the contrary, the Act establishes three entry options and, as the Commission told the Supreme Court, "left the choice of those options to private market actors."[33] And in section 271 Congress required the BOCs to provide access to the network elements comprising the platform, which undercuts any argument that a state rule imposing an obligation to unbundle loops, switching, transport, or signaling is inconsistent with the Act.

4. *Section 271 makes clear that the BOCs must provide unbundled access to loops, transport, switching, and signaling at cost-based rates.* Section 252(d)(1) requires network elements to be provided at cost-based rates. The second item on the section 271 checklist requires BOCs to provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." Therefore, if the Commission requires unbundling of an element under section 251, item two on the checklist requires BOCs to provide unbundled access to that network element and to do so at a cost-based rate pursuant to the standard set forth in section 252 in order to obtain or maintain authorization to provide long-distance service. In addition, the checklist requires the BOCs to provide unbundled access to loops, transport, switching, and signaling.[34] As the Commission concluded previously, those checklist items require the

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[31] *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1684 (2002).

[32] Z-Tel Comments at 89.

[33] *FCC Supreme Court Brief* at 22.

[34] Those checklist items require BOCs to provide:

> (iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.
>
> (v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

BOCs to provide unbundled access to the elements comprising the platform of network elements whether or not other ILECs are required to provide unbundled access to those items.[35]

The drafters of section 271 made clear that the checklist means what it says. Senator Pressler, the sponsor of the Senate bill and the Chair of the Senate Commerce Committee, explained the purpose of the checklist as including "those things that a telecommunications carrier would need from a Bell operating company in order to provide a service such as telephone exchange service or exchange access service in competition with the Bell operating company."[36] Senator Breaux, a "leading backer of the Act in the Senate,"[37] told the BOCs that "this legislation says you will not control much of anything," but instead "will have to allow for nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating companies network."[38] The Supreme Court relied on Senator Breaux's explanation in rejecting the BOCs' challenge to the Commission's pricing methodology and unbundling rules.[39]

As we have explained previously, the focus of the Triennial Review should therefore be on network elements not listed on the checklist. Whether the BOCs must provide the platform of network elements was decided by Congress in 1996: they must, if they seek to provide long-distance service (as all now do). In addition, CompTel recently detailed the impact that availability of these checklist items has had upon FCC review of BOC 271 applications, and correctly pointed out that if the FCC were to alter the competitive checklist, BOC compliance with the requirements of section 271 would have to be reevaluated.[40]

Verizon recognized that the checklist requires it to provide unbundled access to the platform of network elements, regardless of the result of the *Triennial Review*, by filing a petition asking the Commission to forbear from application of the section 271 checklist items

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(vi) Local switching unbundled from transport, local loop transmission, or other services.

47 U.S.C. § 271(c)(2)(B)(iv-vi). In addition, the tenth checklist items requires BOCs to provide "Nondiscriminatory access to databases and associated signaling necessary for call routing and transmission." *Id.* at § 271(c)(2)(B)(x).

[35] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (*UNE Remand Order*), 15 FCC Rcd 3696 (1999), ¶ 468 ("In this Order, we conclude that circuit switching and shared transport need not be unbundled in certain circumstances. Nonetheless, providing access and interconnection to these elements remains an obligation for BOCs seeking long distance approval.")

[36] 141 Cong. Rec. S8,469 (daily ed. June 15, 1995) (statement of Sen. Pressler).

[37] *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1662 (2002).

[38] 141 Cong. Rec. at S8,153 (daily ed. June 12, 1995) (statement of Sen. Breaux).

[39] *Verizon*, *supra*, 122 S. Ct. at 1661.

[40] Letter from Jonathan D. Lee to Marlene H. Dortch (Dec. 12, 2002).

requiring the BOCs to provide unbundled access to loops, transport, switching, and signaling. In their recent letter attacking the state commissions, all of the BOCs implicitly acknowledge that the Commission may not relieve them of the duty to provide unbundled access to the platform in this proceeding. Rather, they ask the Commission (a) to reaffirm its prior decision that BOCs need not provide access to a network element at cost-based rates if that element has been "delisted" under section 251(d)(2) and (b) to preempt states from setting prices for network elements that have been delisted.[41] Qwest's recent *ex parte* filing explicitly conceded that section 271 imposes additional unbundling obligations, but argued that "the only pricing requirements that apply are generic Title II pricing requirements."[42]

The Commission would err by ordering the state commissions to ignore the statutory pricing rule set forth in section 252(d)(1) when establishing rates for network elements. The obligation to lease network elements at cost-based rates is at the heart of the market-opening provisions of the 1996 Act. In *Verizon*, the Supreme Court upheld the Commission's interpretation of the statutory pricing provision for network elements, concluding that Congress gave "aspiring competitors every possible incentive to enter local retail telephone markets," and particularly the right to lease network elements at cost-based rates.[43] It would strain credulity to think that Congress established unbundling obligations in 1996 (both in section 251 and in the section 271 checklist) and set forth a statutory pricing rule for network elements (section 252(d)(1)), and yet intended that state commissions not use the statutory pricing rule when arbitrating interconnection agreements.

In any event, the checklist itself cross-references the cost-based pricing rule: Checklist item two states that the BOCs must provide "network elements" in accordance with the requirements of section 252(d)(1). Loops, transport, switching, and signaling are "network elements" whether they are provided on account of section 251(c)(3) or on account of the checklist. Accordingly, the BOCs must provide those network elements at cost-based rates.

We understand that the BOCs have suggested that the cross-reference to section 251(c)(3) in checklist item two, together with the lack of a cross-reference to section 252(d)(1) in the items on the checklist requiring BOCs to unbundle specific network elements, should be interpreted as meaning that cost-based pricing does not apply to loops, transport, switching, and signaling. (The BOCs did not advance such an argument in their letter seeking preemption, nor did Qwest in its recent letter concerning section 271.) That is an implausible reading of the statute (which may be why it has been advanced orally, but not in writing). There was no reason for Congress to repeat the direction that network elements must be provided at cost-based rates in each checklist item, since it had already set forth that requirement in checklist item two. And the additional requirement in checklist item two that BOCs provide network elements "in accordance with the requirements of" section 251(c)(3) did not *relieve* the BOCs of any obligations. Rather, it imported the obligations set forth in section 251(c)(3) that BOCs provide network elements "at

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[41] *BOC Preemption Letter* at 10, relying on *UNE Remand Order* at ¶ 473.

[42] *Qwest 271 letter* at 1 (title).

[43] *Id.*

any technically feasible point" and "in a manner that allows requesting carriers to combine such elements."

In short, Congress has spoken precisely to the rate to be charged to lease network elements. It has directed the state commissions to establish those rates in accordance with the cost-based rule of section 252(d)(1). It reiterated in the section 271 checklist that the BOCs must provide network elements at the cost-based rates established pursuant to section 252(d)(1). The Commission lacks authority to disregard those congressional commands. In any event, even if there were ambiguity, the Commission could not justify ignoring the pricing rule for network elements that Congress adopted and instructing state commissions to adopt another rate.[44]

The BOCs nevertheless contend that the Commission should replace the cost-based rate rule of section 252(d)(1) with a looser "just and reasonable rate" under sections 201(b) and 202(a). More specifically, they argue that the "just and reasonable rate" should be the rate set by the dominant firm in a particular market – *i.e.*, the BOC – and they call this a "market rate." As an initial matter, this argument fails even on the view that the Commission may look to sections 201(b) and 202(a) with respect to rates for network elements. Those general provisions adopted in 1934 provide that all rates in connection with interstate or foreign communications shall be "just and reasonable" (section 201(b)) and prohibit "unreasonable discrimination" (section 202(a)). Section 252(d)(1) also speaks of "just and reasonable rates" and prohibits discrimination. It provides that "[d]eterminations by a State commission ... of the just and reasonable rate for network elements" shall be "based on the cost" of providing the element and must be "nondiscriminatory." So even if recourse to sections 201(b) and 202(a) were permissible, that would simply lead to the conclusion that Congress has established that the just, reasonable, and nondiscriminatory rate for network elements is a cost-based rate. But in any event, as explained above, Congress did not enact a specific provision governing the rates for network elements in 1996 so that the Commission could order state commissions to ignore that provision when setting rates for network elements. And it would be irrational to conclude that a rate set by a dominant carrier, rather than a cost-based rate, is a just, reasonable, and nondiscriminatory rate.

Moreover, sections 201(b) and 202(a) authorize the Commission to establish rates only for interstate and foreign communications. Network elements, of course, are used to provide service that is intrastate as well – indeed, predominantly intrastate. If the BOCs are correct and the section 251 and 252 pricing principles do not apply to items independently required to be unbundled by the section 271 checklist, then section 2(b) limits the Commission's section 201(b) and 202(a) authority to regulate (or de-regulate) the rates of those items.[45]

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[44] As the Commission's experience with the "proxy rates" shows, the FCC must be cautious about attempting to establish rates for network elements. *Iowa Utilties Board v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000) (vacating the proxy prices because "the FCC does not have jurisdiction to set the actual rates"), *not reviewed by Verizon, supra.*

[45] Because daily usage and detailed call records are provided with regard to unbundled switching, determining the intrastate and interstate portions of switching would not be difficult.

Thus, if the BOCs are correct and the statutory provisions adopted in 1934 governs rates for loops, switching, transport, and signaling required to be provided by section 271, then the Commission would be limited to determining a rate for the interstate portion of the network elements. Such an approach plainly would be the rule that would apply under *Louisiana Public Service Commission v. FCC*. In that case, the Commission argued that it had authority to establish depreciation rates under section 220 and, since it made no sense to depreciate the same equipment pursuant to two different schedules, the states had to follow the federal depreciation rules. The Court rejected that contention and held that, whether or not it made sense, Congress had enacted a regime in 1934 under which "two different persons ... drive one car."[46] The Court explained that under the separations process, equipment regularly was allocated between interstate and intrastate services, so that, for example, 75% of cost of a loop might be allocated to the intrastate sphere and the remainder to the interstate sphere.[47] The Court held that such an approach was required under the provisions of the 1934 Act that allocate responsibility on an interstate/intrastate basis.

Therefore, if the Commission were permitted to ignore the cost-based pricing rule of section 252(d)(1) and price loops, switching, transport, and signaling provided by BOCs pursuant to sections 201(b) and 202(a), the Commission would be restricted to setting a rate for only a portion of each network element. The appropriate state commission would be free to adopt a different rate structure for the portion of the element allocated to intrastate service. Under *Louisiana PSC*, the Commission could *not* dictate to the state commission that it must accept a BOC-proposed "market-based" rate for those loops, switching and transport services.

Qwest's recent letter asks the Commission to "clarify" the relationship between sections 252 and 271 and accurately describes the relationship between those provisions.[48] In the absence of such "clarification," Qwest explained, "the CLEC could demand arbitration, which would mean that the *state* ultimately would have to set the rate for that element."[49] But the power to "clarify" these clear statutory provisions in the manner Qwest requests is not within the Commission's power – it must adhere to the clear terms of the statute. There is simply no basis in law or logic to deleting network elements that Congress clearly intended BOCs to provide in interconnection agreements. Moreover, Qwest's proposal to remedy the "problem" of rates being set by state commissions as Congress provided flies in the face of Congress' explanation of that provision: The Senate Report stated that the checklist sets forth "what must, at a minimum, be provided by a Bell operating company in any interconnection agreement."[50] It is that simple: BOCs must provide loops, transport, switching, and signaling at cost-based rates and state commissions establish rates for those elements, which are set forth in interconnection agreements, when the parties cannot agree.

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[46] *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 364 (1986).

[47] *Id.* at 376.

[48] *Qwest 271 Letter* at 8.

[49] *Id.* at 9.

[50] S. Rep. 104-23, 104th Cong., 1st Sess. 43 (1995).

5. This is not a forbearance proceeding. What the BOCs really seek is forbearance from the cost-based pricing rule of section 252(d)(1). Indeed, they have made clear on a number of public occasions (including recent presentations at the NARUC national convention) that they do not want new entrants like Z-Tel to self-deploy switching or to move off their networks entirely, because they would lose a lot of money if competitors did not lease their network elements. But the BOCs seek to escape from the cost-based pricing rule established by Congress, interpreted by the Commission, and upheld by the Supreme Court in *Verizon*. In our view, there is no basis for forbearance from the requirements of section 252(d)(1). But in any event, the Triennial Review proceeding is not a forbearance proceeding.[51]

While the BOCs oppose establishing unbundling obligations and rates "through the back door" of section 271,[52] their entire approach in the Triennial Review has been to avoid the effect of their defeat in *Verizon* through the back door. They claim that they recognize their obligation to provide network elements – and, indeed, would prefer to have new entrants like Z-Tel on their networks – adding that they "merely" object to the cost-based rates that state commissions have established. But they litigated and lost when challenging the Commission's pricing rules. By and large, they have litigated and lost when challenging specific state commission rate determinations, although they remain free to challenge state pricing decisions in federal district court pursuant to section 252(e)(6). Moreover, although trying to relitigate pricing issues in this proceeding is truly a "back door" approach, there is nothing indirect about relying on section 271 to establish unbundling and pricing obligations. Indeed, the checklist is the most specific provision relevant to this proceeding, since it very clearly establishes particular unbunding obligations and specifically cross-references the cost-based pricing provision.

Finally, even if this were a forbearance proceeding, or even if Verizon's request for forbearance were granted, that would not prevent states acting under independent state authority from establishing unbundling obligations and establishing prices for network elements. As explained above, section 251(d)(3) protects state rules such as the Illinois statute requiring incumbents to lease the platform. The BOCs note that the forbearance provision states that, once the Commission forbears from enforcement of a statutory provision, a state commission may not continue to enforce that provision. But, of course, section 10(e) applies only to provisions "of this Act" – the federal Communications Act – not to provisions of any state law. The Commission lacks authority to forbear from enforcement of, for example, section 13-801(d)(4)

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[51] As noted previously, Verizon filed a petition last Summer seeking forbearance from the checklist items requiring it to provide loops, transport, switching, and signaling. In that separate proceeding, Z-Tel has explained that forbearance will be appropriate with respect to the network elements comprising the platform only when the BOC is no longer dominant in a particular geographic area and there is a vibrant wholesale market in which new entrants may obtain the equivalent of the platform. Although in its forbearance filings Verizon has contended that nondominance is not the appropriate standard, in its recent letter Qwest argued to the contrary. *Qwest 271 Letter* at 2-3. Qwest is correct that this Commission's nondominance decisions are highly relevant to forbearance questions, although it is plainly incorrect in suggesting that the BOCs are currently nondominant.

[52] *BOC Preemption Letter* at 9.

of the Illinois Public Utilities Act, or to order state commissions to forbear from enforcement of such provisions.

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Contrary to the BOCs' contention that the Commission should broadly preempt state unbundling and pricing decisions, the Commission should recognize that Congress (a) resolved many of the issues the BOCs raise and (b) authorized the states to play an important role in making the unbundling and pricing decisions Congress did not resolve. Specifically, Congress mandated that the BOCs must provide unbundled access to loops, transport, switching, and signaling, and also mandated that all network elements must be made available at cost-based rates. With respect to issues involving ILECs other than the BOCs and network elements other than those listed on the section 271 checklist, more granular analyses will be required in light of the D.C. Circuit's decisions in *USTA* and *CompTel.* For that reason, the Commission should embrace the proposals advanced by a number of state commissions and other parties that call for the Commission to rely more heavily on the state commissions to conduct those analyses. The ultimate goal should be to provide a structure under which wholesale alternatives are made available, particularly to carriers seeking to serve residential and small business customers.[53] The states have an important role to play in reaching that objective.

Sincerely,

/s/

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Thomas M. Koutsky
Vice President, Law and Public Policy

[53] *See* Remarks of Commissioner Kevin J. Martin (Dec. 12, 2002), at 11; Z-Tel's "A Five-Step Plan for Building Wholesale Switching and Transport Alternatives," *supra.*